IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3152 OF 2005

Jashan Textile Mills Private Limited
114, Turf Estate,
3/65, Off. Dr.E.Moses Road,
Mahalakshmi,
Mumbai 400 011 .. Petitioner

V/s

1. The Deputy commissioner of
Income-tax 4(2), Mumbai,
Aaykar Bhavan, M.K.Road,
Mumbai - 400 020

2. The Commissioner of Income-tax
IV, Aaykar Bhavan, M.K.Road,
Mumbai - 400 020

3. Union of India through the
Secretary, Ministry of Law
Justice & Company Affairs,
North Block,
New Delhi - 110 101 .. Respondents

WITH
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Shri.S.N.Inamdar with Shri.Atul Jasani for the Petitioners.
Shri.E.P.Chopra for the Respondents.

CORAM : DR.S.RADHAKRISHNAN &
J.P.DEVADHAR, JJ.

DATE : 28TH FEBRUARY, 2006.

JUDGMENT (PER :- J.P. DEVADHAR, J.)

1. Heard learned Counsel for both sides. Rule.

Rule is made returnable forthwith. By consent of parties, both these petitions are taken up for final hearing.

2. In these two Writ Petitions, the Petitioners have challenged the notices issued under section 148 of the Income Tax Act, 1961 as also the order passed by the Assessing Officer rejecting the objections raised by the Petitioners for re-opening the assessments for the Assessment Year 1998-99 and the Assessment Year 1999-2000.

3. Since the facts in both the Writ Petitions are more or less similar, for the sake of convenience in this Judgment, we set out the facts in the Writ

Petition No.3152 of 2005. The decision in Writ Petition No.3152 of 2005 will apply to the Writ Petition No.3153 of 2005 as well.

4. For the Assessment Year 1999-2000, the return filed by the Petitioner was assessed under section 143(3) of the Income Tax Act and an assessment order was passed accordingly by the Assessing Officer on 23rd January, 2001.

5. By the impugned notice issued under section 148 of the Income Tax Act, 1961 dated 16th March, 2005, the Assessing Officer sought to re-open the assessment for the Assessment Year 1999-2000 for the reasons set out therein. The Assessee filed its objection for re-opening the assessment. The Assessing Officer by his order dated 7th December, 2005 has rejected the objection for re-opening of the assessment. Accordingly, challenging the notice for re-opening the assessment under section 148 of the Income Tax Act as well as the order passed by the Assessing Officer rejecting the objection raised to the notice under section 148 of the Income Tax Act, the Petitioner has filed present petition.

6. Shri.Inamdar, the learned Counsel appearing on behalf of the Petitioner submitted that from the

reasons recorded for re-opening the assessment it is seen that there is no failure on the part of the Assessee to disclose fully and truly all material facts. On the contrary, the reasons recorded by the Assessing Officer clearly shows that the reopening of the assessment is based on examination of the records available with the department and there is no allegation of failure on the part of the Assessee to disclose fully and truly all material facts. Therefore, the re-opening of the assessment beyond four years without there being any failure on the part of the Assessee cannot be sustained.

7. Shri.Inamdar further submitted that in the present case the dispute pertains to the market value adopted by the Petitioner in respect of Hexapeptide manufactured by them prior to its manufacture in one of its units, the Petitioner used to import Hexapeptide from other countries. While transferring the indigenously manufactured Hexapeptide from one unit to another unit since the Assessment Year 1994-1995, the Petitioner has been taking the last landed cost of the imported goods as the fair market value of the Hexapeptide manufactured by them. According to the Petitioner, at the relevant time, Hexapeptide was not manufactured by any one in India and therefore they had taken the fair market value on

the basis of the landed cost of the imported goods. For the Assessment Year 1994-1995, the Assessing Officer objected to the said valuation and on explanation given by the Petitioner, the said valuation was accepted. Thereafter in every subsequent assessment year, the said valuation offered by the Petitioner based on the last landed cost has been accepted by the Revenue. Accordingly, Shri.Inamdar submitted that all along the Assessee has disclosed the basis on which the market price has been arrived and since 1994-95 the Assessing Authorities have accepted the basis adopted by the Assessee and therefore, it is not open to Assessing Officer to re-open the assessment for the years in question.

8. Shri.Inamdar further submitted that even in the Assessment Year 1999-2000 which is the subject matter of the present petition, the Assessing Officer, during the assessment, had raised the query regarding the market valued adopted by the Assessee and the Assessee by its letter dated 27th December, 2000 had furnished the basis for determining the market price of the goods manufactured in their unit and the Assessing Officer, on consideration of the facts deemed it fit to reduce the market price by Rs.130-150 per gram. Thus in the Assessment Year 1999-2000, the issue of market value was again raised and after

considering the submission, the price was reduced. In these circumstances it is not open to Assessing Officer once again to agitate the issue by initiating proceedings for reopening the assessment and that too when there is no failure on the part of the Assessee to disclose the basis of fixing the transfer price.

9. Relying upon the judgment of this Court in the case of **Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income-Tax and Others (No.1)-I.T.R. reported in Vol.268-P.332**. Shri.Inamdar submitted that it is not open to Assessing Officer to supplement the reasons by filing an affidavit. He further submitted in the present case the Assessing Officer, by his order dated 7th December, 2005 as well as the affidavit-in-reply filed in the petition, has sought to supplement reasons which is not permissible in law. Shri.Inamdar submitted that in the present case the revenue has not made out case for re-opening the assessment beyond four years. As regard the Directors' Report dated 31st March, 1993, Shri.Inamdar submitted that the said report was in fact submitted by the Assessee during the relevant assessment proceedings and therefore, the statement contained in the said Report cannot be the basis to hold that there is any failure on the part of the Assessee to disclose fully and truly all material

facts. He submitted that the findings recorded in the order rejecting the objections to the effect that on sale of the final product the Assessee is incurring loss is also factually incorrect. From the documents annexed to the petition, Shri.Inamdar pointed out that the Assessee had made substantial profits on sale of the final products and therefore, reasoning given by the Assessing Officer while rejecting the objections are totally erroneous. With reference to the assessment order for the Assessment Year 2002-2003, Shri.Inamdar submitted that the Commissioner (Appeals) has set aside the findings recorded in the said Assessment Order and that fact was brought to the notice of the Assessing Officer in the present case. However, the same has not been taken into consideration while rejecting the objections. Accordingly, Shri.Inamdar submitted that none of the requisite conditions have been fulfilled for re-opening the assessment under section 148 of the Income Tax Act, 1961 and therefore, the impugned notices issued are liable to be quashed and set aside.

10. Shri.Chopra, learned Counsel for the Respondents, on the other hand supported the orders passed by the Authorities below. He submitted that from the reasons recorded for reopening the assessment as elaborated in the order rejecting the objection it

can be seen that the transfer price shown by the Petitioner in respect of the goods manufactured by them was not just and proper. He submitted that the reasons recorded for re-opening the assessment can be supplemented by an order while dealing with the objections raised by the Assessee. He submitted that on the basis of the Directors' report dated 31st March, 1993 as well as the submission made by the Assessee, during the assessment proceedings for Assessment Year 2002-2003, it was evident that the transfer price fixed by the Assessee for the relevant years was incorrect and therefore, the Assessing Officer was justified in invoking the provisions of Section 148 for re-opening the assessment. Shri.Chopra further submitted that the very fact that the transfer price has remained constant since the Assessment Year 1994-95 for several assessment years itself shows that the transfer price fixed by the Assessee was erroneous. Accordingly, Shri.Chopra submitted that the Assessing Officer was justified in re-opening the assessment. He submitted that the Assessee is entitled to raise all contentions in the re-assessment proceedings and therefore, no interference is called for at this stage. Accordingly, he submitted that the above petitions be dismissed with costs.

11. We have carefully considered the rival submissions as well as the authorities cited before us.

12. It is well established by a catena of decisions of this Court that in cases where the assessments are completed under section 143(3) of the Income Tax Act, re-opening of the said assessment under section 148 of the Income Tax Act beyond the period of four years from the end of relevant Assessment Year can be sustained only if it is established that there was failure on the part of the Assessee to disclose fully and truly all material facts. (See **IPCA Laboratories Ltd. Vs. Gajanand Meena, Deputy Commissioner of Income Tax and Others- Vol.251 - ITR 416 (Bombay)** and **ICICI Bank Ltd. Vs. K.J. Rao and Another - Vol. 268 - ITR 203 (Bombay)**). In the present case, from the reasons recorded for the re-opening the assessment it is seen that the reopening is solely based on the materials already on record and it is not the case of the revenue that there was any failure on the part of the Assessee to disclose fully and truly material facts. If there is no failure on the part of the Assessee to disclose fully and truly all material facts, then the re-opening of the assessment is liable to be quashed and set aside on that ground alone.

13. While rejecting the objections raised by the Petitioner, the Assessing Officer has recorded that on sale of the final product, the Assessee had incurred loss. From the annexures to the Petition, it is seen that, in fact, on sale of the final product the Assessee has made substantial profits. Thus, even the conclusion drawn by the Assessing Officer against the Petitioner appear to be based on total misconstruction of facts. Reliance placed on the Directors' report does not support the case of the Revenue because the said report for the year ending on 31st March, 1993 was submitted by the Assessee during the assessment proceedings in the relevant assessment year and the assessment order for that year has been passed after considering the said report. Therefore, when the Director's report was already there on record, the contents of that report cannot constitute failure on the part of the Assessee to disclose fully and truly all material facts. Similarly, the contention that in the assessment proceedings for the Assessment Year, 2002-2003, the Assessee had admitted that the transfer price adopted in the past was not correct does not support the case of the Revenue because, firstly it is pointed out that the findings recorded by the Assessing Officer in that year has been set aside by the Commissioner of Income Tax (Appeals). Secondly,

assuming that the Assessee had agreed during the assessment proceedings for Assessment Year 2002-2003 that the determination of the market value of the goods for the earlier years was erroneous, that cannot be a ground to reopen the assessment because that admission is not on account of any failure on the part of the Assessee to disclose fully and truly all material facts. The Revenue cannot invoke Explanation 2 to section 147 of the Income Tax Act in the present case because the assessment sought to be reopened is beyond four years from the end of the relevant assessment year and there is no failure on the part of the Assessee to disclose fully and truly all material facts. In other words, where the assessment is sought to be reopened beyond four years from the end of the relevant assessment year, then, unless it is established that there was failure on the part of the Assessee to disclose fully and truly all material facts the question of invoking Explanation:2 to Section 147 does not arise at all.

14. For all the aforesaid reasons we are of the opinion that in the present case, the notices issued for the re-opening of the assessments do not fulfil the preconditions required to be fulfilled for reopening the assessment. Accordingly, we quash and set aside the impugned notices issued under section

148 of the Income Tax Act, 1961. Rule is made absolute in terms of prayer clause (a) in both the petitions. However, there will be no order as to costs.

(DR.S.RADHAKRISHNAN,J.)

(J.P.DEVADHAR,J.)